

KAPLANDS SDN BHD

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v.

LEE CHIN CHENG DENGKIL OIL PALM
PLANTATIONS SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J

[CIVIL SUIT NO: S7(S4)22-321-98]
28 AUGUST 2000

CIVIL PROCEDURE: *Amendment - Pleadings - Statement of claim - Application for leave to amend - Two years after suit was filed - Supporting affidavit deposed by solicitor - Affidavit contains disputed facts - Delay not explained*

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Approximately two years after the suit was filed, the plaintiff made an application for leave to amend the statement of claim. The application was supported by an affidavit deposed by its solicitor. The affidavit however disclosed no explanation as to the delay. The counsel for the defendant objected to it on the ground that a solicitor should not depose a contentious affidavit. Rejecting the affidavit the senior assistant registrar (SAR) dismissed the application. The plaintiff appealed.

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Held:

[1] In the light of the contents of the affidavit, the court was satisfied that there were disputed questions of facts. As such, it should have been deposed by an appropriate officer of the plaintiff familiar with the facts and not the plaintiff's solicitor.

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[2] As there had been a long delay, the supporting affidavit must explain the delay unless if the amendment was plain or trivial in nature or was not opposed by the other party, to enable the court to assess and decide whether in the circumstances of the case leave to amend ought to be granted.

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[3] Since the affidavit was rightly rejected by the SAR, the application was not supported by any affidavit. The plaintiff therefore was in no position to satisfy the court that the three conditions relating to amendment as laid down in *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn Bhd* had been fulfilled.

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[Appeal dismissed.]

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a Case(s) referred to:

Bacom Enterprise Sdn Bhd v. Jong Chuk [1998] 2 CLJ 11 (**refd**)

Ketteman v. Hansel Properties Ltd [1988] 1 All ER 38 (**refd**)

Lembaga Pelabuhan Johor v. The Pacific Bank [1998] 1 CLJ 742 (**refd**)

Majlis Amanah Rakyat v. Tan Sek Hong & Ors [1994] 2 AMR 25 (**fol**)

Million Group Credit Sdn Bhd v. Lee Shoo Khoo [1985] 1 CLJ 181 (**fol**)

b *Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd* [1985] 2 CLJ 97 (**fol**)

Taisho Company Sendirian Berhad v. Pan Global Equities & Anor [1999] 1 CLJ 703 (**refd**)

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd [1983] 1 MLJ 213 (**refd**)

Legislation referred to:**c** Rules of the High Court 1980, O. 20 r. 5**Other source referred to:**

Malaysian Court Forms in Civil Proceedings, Vol 4, para 20413, p 2018

The Supreme Court Practice 1995, vol 1, pt 1

d *For the appellant - Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co*
For the respondent - CC Chan; M/s Lee Hishamudin

Reported by Izzaty Izzuddin

JUDGMENT**e Hishamudin Yunus J:**

Enclosure 80 is an interlocutory appeal to judge in chambers against the decision of the learned senior assistant registrar dismissing the plaintiff's application (at encl. 67) for leave to amend the statement of claim.

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The paragraph in the statement claim intended to be amended was para. 10. As it is, the paragraph reads:

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10. At all material times to this action, the said land was, *inter alia*, subject to the following encumbrances:

(a) Private Caveat Jilid: 22 Folio: 122 dated 9-1-1995 by MPI Paper Mills Sdn Bhd;

(b) Private Caveat Jilid: 66 Folio: 110 dated 24-10-1997 by Straw Paperboard Industries (M) Sdn Bhd;

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(c) Private Caveat Jilid: Folio 186: dated 18-02-1998 lodged by Golden Skyline Sdn Bhd.

By the application to amend, the plaintiff proposed to amend the above

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para. 10 by deleting sub-paras (b) and (c). The application was supported by an affidavit, that is, encl. 68. The defendants opposed the application and had filed an affidavit in opposition, that is, encl. 72. a

Having heard the submissions and considered the affidavits I had dismissed the appeal with costs. I shall now state my grounds. b

First, I accept the submission of the learned counsel for the respondent/defendant, En CC Chan, that the learned senior assistant registrar was right in law in rejecting the affidavit of the appellant/plaintiff (affidavit of Shahidah bt. Aris at encl. 68) filed by the plaintiff in support of the application. The affidavit should not have been deposed by the plaintiff's solicitor. It should have been deposed by an appropriate officer of the plaintiff familiar with the facts. c

In *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon* [1985] 1 CLJ 181 M Shankar J (as he then was) said: d

A second point which needs to be emphasized is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence.

In *Seng Huat Hang Sdn Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1985] 2 CLJ 97 Edgar Joseph Jr. J (as he then was) said: e

With respect, in matters where disputed questions of fact are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto: (See *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & 5 Ors.* [1985] 1 CLJ 181). f

The learned counsel for the plaintiff, Dato' Mahinder Singh Dulku, on the other hand, urged the court to allow the affidavit to stand by citing *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & 54 Ors.* [1994] 2 AMR 25 1298 where Abdul Malik Ishak JC (as he then was) allowed an affidavit deposed by counsel to be admissible. Although Abdul Malik Ishak JC in *Majlis Amanah Rakyat* did refer to the *dicta* of M. Shankar J in *Million Group*, the learned judicial commissioner, however, did not refer to *Seng Huat Hang* (perhaps this case was not brought to the attention of his lordship). In *Majlis Amanah Rakyat*, the objection (overruled by the court) by the plaintiff to the affidavit of the defendants was on the ground of hearsay, that is to say, the counsel who deposed the affidavit had no personal knowledge of the matters deposed therein, whereas in the case before me the objection is more fundamental: that a **solicitor** should not depose a contentious affidavit. With respect, where disputed questions of fact are involved, I think the better view on the issue as to whether or g
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a not a solicitor could depose an affidavit on behalf of a litigant would be that as expressed by M Shankar J in *Million Group* and by Edgar Joseph Jr. J in *Seng Huat Hang*. In the case before me, in the light of the contents of the defendant's affidavit, I am satisfied that there were disputed questions of facts.

b Since the affidavit was rightly rejected by the learned senior assistant registrar, the plaintiff's application to amend was, therefore, not supported by any affidavit.

c Now, if there was no supporting affidavit, was the plaintiff then in a position to proceed with his application to seek leave of the court to amend?

d The answer, I think, must be in the negative. Where a party applies to the court for leave to amend his pleading pursuant to O. 20 r. 5 of the Rules of the High Court 1980, he must, except in cases where the amendment is plainly and obviously trivial in nature or where there is no opposition to the application, satisfy the court that the application is in compliance with the principle as laid down by the Federal Court in *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213. Mohamed Azmi FJ in delivering the judgment of the court ruled (at pp. 214 and 215):

e The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* page 342).

f Without a supporting affidavit, the plaintiff in the present case was in no position to satisfy the court that the three conditions as laid down by the Federal Court had been satisfied. Thus, the application should be, and was rightly, dismissed.

g Even assuming that I were to rule that the supporting affidavit of the plaintiff should be allowed to stand, it is pertinent to observe that the affidavit merely states:

h I, Shahidah bt Aris @ Mohd Haris (NRIC No. 690301-10-5254) an Advocate & Solicitor of full age and understanding and of No. 2, Lintang Sungai Ara Satu, Bayan Lepas, 11900 Penang do hereby solemnly and sincerely affirm and say as follows:

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1. I am one of the solicitors having the conduct of the matter for and on behalf of the Plaintiff abovenamed. I am duly authorized to affirm this affidavit in its behalf. **a**
2. In view of the 3rd party proceedings initiated by the Defendant, the Plaintiff has informed me to:
 - (a) amend paragraph 10 of the Statement of Claim by deleting paragraphs 10(b) and (c) thereof; **b**
 - (b) make minor amendments to the other paragraphs of the Statement of Claim without changing the character of the suit.
3. The purpose of the amendments is to retain the original character of the suit. The new allegations of the Defendant would turn the suit into another character and therefore prolong the expeditious disposal of the suit. **c**
4. In view of the proposed amendments to the Statement of Claim I verily believe it would not be necessary for the Defendant to proceed with the third party proceedings. However, the proposed amendments are not to be construed as any admission on the part of the Plaintiff, of whatsoever nature, of the Defendant's allegation contained in the Defendant's Affidavits filed in support of the application to amend the Defence. **d**
5. I therefore respectfully pray for an Order-in-Terms of the application filed herein. **e**

The affidavit thus is not only too brief and sketchy and very shallow in its content, but also does not appear to address itself fully to the fulfillment of the three conditions stipulated in *Yamaha*. Indeed, it does not explain anything at all. For instance, what is the "3rd party proceedings" about? In what way do the said 3rd party proceedings necessitate an amendment to para. 10 of the statement of claim? And what are the "new allegations of the defendant"? The affidavit is, clearly, devoid of any evidential value. **f**

Dato' Mahinder, however, submitted that a supporting affidavit is not a must in an application for leave to amend a pleading. The learned counsel referred to *The Supreme Court Practice* 1995 vol. 1. p. 1, (hereinafter referred to as "the *White Book*") which states (at pp. 370-1 para. 20/5-8/4): **g**

An affidavit is not required, as a rule, except in cases of amendment of a writ issued for service out of the jurisdiction (see *Holland v. Leslie* [1894] 2 QB 346, pp. 348, 450: O. 11 r. 4). **h**

With respect, I am in agreement with En CC Chan that *Holland v. Leslie* does not lay down the proposition that "an affidavit is not required, as a rule, except in cases of amendment of a writ issued for service out of jurisdiction". **i**

- a* In *Holland v. Leslie* the defendant was a foreign subject residing in the United States. The plaintiff, in pursuance of leave obtained, issued a writ for service out of the jurisdiction against the defendant, and notice of the writ was in due course served upon the defendant. The plaintiff subsequently took out a summons to amend the statement of claim indorsed on the writ.
- b* The learned judge allowed the application and the defendant appealed to the Divisional Court of the Queen's Bench Division. Two points were raised on appeal:

- (1) that the learned judge had no jurisdiction to make the amendment at all;
- c* (2) that the facts upon which the order was made were not verified by affidavit.

Only point (2) is relevant here. On this point, Cave J, in delivering, the judgment of the Divisional Court, held (at p. 348):

- d* In the second place, it is contended that the amendment was made upon a statement of facts which was not verified by affidavit. If the party takes the objection at chambers that the judge has not the proper evidence before him, he cannot make the order; the opposing party is entitled to have the facts upon which the order is founded placed upon affidavit, upon terms as to costs in proper cases.
- e* I am, however, not satisfied in the present case that the point was taken before the judge in chambers. The appeal must be dismissed.

It is clear, therefore, that *Holland v. Leslie* did not lay down the legal proposition as stated in the *White Book*.

- f* However, En CC Chan, in fairness to the plaintiff, brought to my attention a passage in the *Malaysian Court Forms in Civil Proceedings*, Malayan Law Journal Sdn. Bhd. vol. 4 which appears to support Dato' Mahinder's contention. The passage states (at p. 20181 para. 20413):

- g* A supporting affidavit is not usually required but may be necessary if there has been a great delay or there is suspicion of bad faith (*Conybeare v. Lewis* [1881] 44 LT 242).

- h* Upon reading the case cited (*Conybeare*), with respect, it is my view that the case does not support such a proposition. In this case cited, the plaintiff after the issue of his writ, discovered new facts bearing upon the case. The plaintiff then took out a summons before the chief clerk for leave to amend his writ and statement of claim to include the new facts. The defendants, when before the chief clerk, demanded an affidavit on the part of the plaintiff in support of his summons, and at the request of the chief clerk
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the plaintiff filed an affidavit. The defendants then cross-examined the plaintiff on the affidavit, but the cross-examination was not completed. The plaintiff then applied to the clerk to adjourn the summons into court, but the clerk refused, because the cross-examination was incomplete. The plaintiff then brought a motion for leave to amend the writ and statement of claim. The Master of the Rolls (Jessel MR) held (at p. 242):

Let us consider the circumstances. An application was made by the plaintiff in chambers for leave to amend his writ and statement of claim. That he had a right to do this was clear – the application for leave was merely formal, because matters subsequent to the issue of the writ had arisen. It is not the practice in my chambers to require an affidavit in support of such an application. New facts had been discovered, matters germane to the cause, and therefore proper to be inserted. The solicitors for the defendants required the plaintiff to put in an affidavit in support of his summons, and cross-examined him upon his affidavit, not for the purpose of resisting the application, but of showing that the plaintiff was a dummy put forward by other persons, and that the action was not *bona fide*. This, in my opinion, was an abuse of cross-examination; an attempt to obtain evidence – in fact, to anticipate the trial.

Thus it will be observed that in the above case an affidavit in support was in fact filed by the applicant/plaintiff and that the issue was not whether an affidavit in support of the application to amend was necessary or not but whether the defendants had the right to cross-examine the applicant/plaintiff on his affidavit (which, on the facts, the Master of the Rolls considered an abuse of the process of the court). Jessel MR was not laying down any principle as to the filing of an affidavit in support of an application to amend but was only stating the practice of his court in relation to the filing of affidavits in the circumstances of the case before him. In any case, considering that the above case was decided in 1881 and made no mention of such principle as enunciated in *Yamaha*, it is my view that, in the light of *Yamaha*, the “practice” of Jessel MR in the late 19th century should now be considered obsolete.

I shall now move on to my second ground. It is this. There has been a long delay in applying for the amendment and the delay has not been accounted for by affidavit evidence. Even if the plaintiff’s affidavit (which has been rejected by this court) were admissible, the affidavit, as can be seen, does not give any reason for the long delay. The suit was filed on 28 May 1998 and the case was fixed for trial twice since then. But the application to amend was only filed on 29 May 2000. Thus there has been a delay of about two years. The House of Lords in *Ketteman v. Hansel Properties Ltd* [1988] 1 All ER 38 has issued a warning to litigants in regard to the frequent practice of making late applications for amendments. Lord Griffiths said (at p. 62):

- a* Another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.
- b* There will be cases in which justice will be better served by allowing the consequences of the negligence lawyer to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings.

The above passage was cited with approval by our Court of Appeal in *Bacom Enterprise Sdn. Bhd. v. Jong Chuk* [1998] 2 CLJ 11.

- c* In my judgment, it is the law that where there has been a long delay in applying for leave to amend a pleading, there must be an affidavit to explain the delay; except in cases where the amendment is plainly and obviously trivial in nature or where the opposite party does not oppose the application. Only if there is an explanation by way of an affidavit will the
- d* court be in a position to assess and decide whether in the circumstances leave to amend ought to be granted or not (see *Lembaga Pelabuhan Johor v. The Pacific Bank* [1998] 1 CLJ 742; and *Taisho Company Sendirian Berhad v. Pan Global Equities & Anor* [1999] 1 CLJ 703).

- e* The appeal was, therefore, dismissed with costs.

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